BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLORIA JEAN RAY	)	
Claimant	)	
VS.	)	
	)	Docket No. 261,963
LAWRENCE MEMORIAL HOSPITAL	)	
Respondent	)	
AND	)	
	)	
ROYAL & SUN ALLIANCE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appeal the Order of December 14, 2005 of Administrative Law Judge Brad E. Avery. Claimant's attorney was awarded attorney fees in the amount of $2,469 and costs in the amount of $37.21 for the post-award litigation efforts provided on claimant's behalf. This matter was presented to the Appeals Board (Board) based upon the briefs of the parties, for determination without oral argument.

ISSUES

Respondent brings the following issues to the Board for its consideration:

1. Whether the claimant's counsel is entitled to attorneys fees when no Post-Award Hearing is held;

2. Whether or not a denial of Post-Award medical benefits existed;

3. Whether or not claimant's attorney complied with K.S.A. 44-523 and amendments thereto, in requesting a Post-Award Medical benefits Hearing;

4. Whether or not the attorneys fees and costs requested by claimant's attorney and awarded by Judge Avery are reasonable and consistent with K.S.A. 44-536.

5. Whether or not the Division of Workers' Compensation must treat the appointment of an approved physician, under K.S.A. 44-510(h) [sic], as to defeat the application for hearing under K.S.A. 44-510(k) [sic].

6. Whether or not Judge Avery was incorrect in ruling that testimony regarding testimony of claimant [sic] regarding reasonableness of services provided under K.S.A. 44-536, was inadmissible.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Order of the Administrative Law Judge should be affirmed.

Respondent raises several issues for the Board's consideration with regard to the request by claimant's attorney for post-award attorney fees and costs stemming from claimant's request for post-award medical care.

Claimant originally suffered injuries to her knees and legs. Compensation for those injuries was paid pursuant to a settlement award on July 1, 2003. On July 6, 2004, claimant's attorney filed an Application For Post Award Medical (form E-4) requesting additional medical care to relieve claimant of the effects of her work-related injuries. The matter proceeded to hearing before Judge Avery on September 7, 2004. At that time, an off-record conversation was held between the ALJ and the attorneys, with the resulting agreement being that the parties waived the foundation requirements for medical testimony and/or medical documents, waived the setting of terminal dates and allowed the court to treat this as a preliminary hearing, even though it was filed as a post-award hearing.[2] There were no objections by either attorney at that hearing to the procedures set out by the ALJ. An Order issued September 10, 2004, by the ALJ authorized claimant to go to Jeffrey C. Randall, M.D., for medical care. Claimant's attorney then requested attorney fees, post award, filing his affidavit with the court on January 26, 2005, with an attached statement listing both attorney time and office staff time generated litigating claimant's request for post-award medical care. The ALJ, after the December 6, 2005 motion hearing, issued his December 14, 2005 Order granting claimant's counsel attorney fees in the amount of $2,469 and expenses in the amount of $37.21.

Respondent raises several objections to this Order. Respondent first argues that claimant's counsel should not be entitled to attorney fees when no post-award hearing was held. However, it is clear from the comments by the ALJ at the September 7, 2004 hearing that the matter was filed as a post-award matter, but the agreement of the counsel during an off-record discussion resulted in the matter being treated as a preliminary hearing, even though it had been filed as a post-award matter. Furthermore, conducting an actual

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[1] Respondent's Application For Review at 1-2.

[2] P.A.H. Trans. at 4-5.

hearing is not a prerequisite for awarding attorney fees. The fact that services were provided, post award, is sufficient. The Board rejects respondent's argument in this regard.

Respondent also argues that there was not a denial of post-award medical benefits. Claimant's attorney first provided to respondent a request for medical care in the form of a letter provided on June 15, 2003 [sic].[3] Rather than provide post-award medical care, respondent's attorney provided a letter in response requesting copies of the medical records from claimant's family physician, who had recommended the additional treatment for claimant's knee. The matter then was set for post-award hearing, with respondent's attorney requesting medical records two more times and claimant's attorney providing the records from Dan G. Severa, M.D., attached to claimant's attorney's letter of August 24, 2004. Respondent argues that claimant was authorized all along to go to Dr. Randall, the doctor who was claimant's treating doctor at the time of the settlement and who was ultimately ordered as the treating doctor by Judge Avery in the September 10, 2004 Order For Medical Treatment. Respondent argues that all claimant had to do was contact the insurance company and obtain permission to go to Dr. Randall. However, respondent seems to overlook the impropriety of a represented claimant to be in direct contact with an insurance company. Moreover, that Dr. Randall was still authorized was never communicated to claimant's counsel. Were this so, it is difficult to understand why respondent neglected to mention this in his letter to claimant's counsel after receiving the request for medical care in June 2004. Additionally, when the ALJ questioned respondent's counsel at the December 6, 2005 motion hearing, the following conversation occurred:

> JUDGE AVERY: Was there any authorization for her to continue to see Dr. Randall?
>
> MR. HOGAN: Your Honor, there's an order of the Court.
>
> JUDGE AVERY: No, that wasn't my question. Was there any authorization of [sic] insurance company for her to continue to see Dr. Randall?
>
> MR. HOGAN: Your Honor, I don't know how the Court cannot see –
>
> JUDGE AVERY: Could you please answer.
>
> MR. HOGAN: – the agreement, Your Honor.
>
> JUDGE AVERY: No –
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> MR. HOGAN: I am attempting to answer the question.

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[3] As noted in respondent's brief, the actual date this letter was provided was June 15, 2004. (See Respondent's brief at 3.)

> JUDGE AVERY: No, no, no it's going to be yes or no answer. Was there a continuing authorization on the part of the insurance carrier for her to see Dr. Randall?
>
> MR. HOGAN: My answer to that is yes.
>
> JUDGE AVERY: Okay. And was that transmitted somehow to the claimant through her attorney.
>
> MR. HOGAN: Your Honor, you are asking me whether or not what conversations Mr. Miller had with Ms. Ray and obviously I cannot answer that question.
>
> JUDGE AVERY: No, I'm asking you whether the insurance carrier who you represented transmitted that information to Mr. Miller that there was a continuing authorization for her to see Dr. Randall.
>
> MR. HOGAN: Your Honor, I'm not sure that there was a specific authorization for her continued treatment with Dr. Randall.[4]

It is clear from this on-record conversation that respondent's attorney was not aware of a specific authorization for claimant to have continued treatment with Dr. Randall, even though that argument was presented. The Board finds respondent's argument in this regard to be disingenuous.

Respondent argues claimant's attorney failed to comply with K.S.A. 44-523 in requesting a post-award medical benefits hearing. K.S.A. 44-510k requires that the request for post-award medical be made upon the form set forth by the Director for the furnishing of medical care. As claimant's attorney utilized the E-4 Application For Post Award Medical provided by the Division of Workers Compensation, the Board finds respondent's argument in this regard lacks merit. If respondent's attorney is arguing that the requirements of K.S.A. 44-523 be met, the Board first notes that K.S.A. 44-510k requires the application for hearing be filed and that the hearing be conducted pursuant to K.S.A. 44-523. It does not specify that the pre-hearing filings by claimant's attorney meet with the requirements of K.S.A. 44-523. Additionally, it is noted that at the time of the September 7, 2004 hearing, no objection was raised by respondent's attorney to the hearing request or the procedures utilized by claimant's attorney in obtaining that hearing.

Respondent argues that the attorney fees and costs requested by claimant's attorney are neither reasonable nor consistent with K.S.A. 44-536. It is noted that claimant's attorney did follow the requirements of K.S.A. 44-536 in filing an affidavit with an attached itemization of services and times incurred by both the attorney and his support staff in litigating the request for medical care. The Board acknowledges that there are

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[4] M.H. Trans. at 12-13.

numerous entries on the attorney fees time sheet which raise questions which are not answered by this record. The Board is troubled by the multiple entries which specify "review documents" as the only explanation for the time involved. However, there were arguments presented to the ALJ regarding the timed entries, but no specific questions were submitted to claimant's attorney or to claimant's attorney's staff, nor was any evidence offered from any other source regarding the appropriateness of the time spent.

The ALJ in refusing to allow respondent's attorney to invade the attorney-client privilege when respondent attempted to examine claimant regarding her contact with her attorney was correct in his rulings. Additionally, the Board questions what information claimant would have regarding the billing practices of claimant's attorney or the material utilized to create the entries on the time sheet by claimant's attorney's staff. These questions would more appropriately be submitted to claimant's attorney and/or his staff should questions regarding their time keeping practices or regarding specific entries made on the time sheet be raised. The Board finds that the filing of the affidavit by claimant's attorney with the attached time sheet creates a prima facie case that the time was actually spent as listed. Once that prima facie case is established, it is respondent's burden to rebut claimant's attorney's contentions regarding the time and effort spent in litigating this dispute. Respondent failed to present any evidence that contradicted those time entries.

In reviewing the affidavit with the attached time sheet, the Board does note numerous entries dealing with reviewing documents. The Board questions the amount of time required to obtain a simple examination by the once-authorized treating doctor. However, the Board cannot find that the fault lies with claimant's attorney. It is obvious from the documentation contained in this record that the lack of cooperation between the attorneys resulted in a several-month delay on claimant's attempts to obtain medical care for her work-related injuries. The post-award medical procedure set forth in K.S.A. 44-510k is intended to expedite the obtaining of additional medical care by a once-injured claimant. That expedited procedure in this case does not appear to have created the desired result, i.e., the quick providing of medical care to an injured claimant.

Finally, respondent's attorney challenges whether the appointment of an approved physician under K.S.A. 44-510h defeats the application for a hearing under K.S.A. 44-510k. Respondent appears to be arguing that it has an obligation to provide medical care and had done so with the appointment of Dr. Randall as the authorized treating physician. However, as noted above, at the motion hearing of December 6, 2005, respondent's attorney was unable to verify to the ALJ that there was a specific authorization for claimant to have continued treatment with Dr. Randall for post-award purposes. Therefore, this argument on respondent's part also fails.

The Board finds several of respondent's arguments to be disingenuous; in particular, the arguments dealing with whether a post-award hearing was held or whether the matter was treated as a preliminary hearing, with the comments by the ALJ indicating that arrangement was made by agreement of the parties. Additionally, respondent's argument

that claimant was authorized at all times to return to Dr. Randall appears to conflict with the representations by respondent's attorney to the ALJ when that specific question was asked at the December 6, 2005 motion hearing. The Board would anticipate in the future better cooperation between attorneys when attempting to determine whether a physician is authorized and whether a claimant is entitled to ongoing, post-award medical care for legitimate work-related injuries.

Claimant's attorney has also requested attorney fees for the frivolous appeal provided by respondent. The Board does not find respondent's appeal to be frivolous, although there are questions raised with regard to the legitimacy of at least two of the issues. Additionally, claimant's attorney requests fees utilized in the preparation of its argument to the Board. The Board is limited under K.S.A. 2005 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge. As the time and efforts utilized in presenting this appeal to the Board have not been presented to the ALJ, the Board will not make a determination regarding the appropriateness of any fees generated during those activities.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated December 14, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
Matthew M. Hogan, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director